# No. 09-1335

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**Suhail Nazim Abdullah AL SHIMARI,**
**Taha Yaseen Arraq RASHID,**
**Sa'ad Hamza Hantoosh AL-ZUBA'E,** and
**Salah Hasan Nusaif Jasim AL-EJAILI,**
Plaintiffs-Appellees,

**v.**

**CACI INTERNATIONAL INC** and
**CACI PREMIER TECHNOLOGY, INC.,**
Defendants-Appellants.

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**On Appeal From The United States District Court**
**For The Eastern District of Virginia, Alexandria Division**
**Case No. 1:08-cv-00827**
**The Honorable Gerald Bruce Lee, United States District Judge**

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# APPELLANTS' REPLY BRIEF

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## I. INTRODUCTION

A pervasive theme in Plaintiffs' brief is that discovery should precede a determination whether CACI is immune from suit. But the facts relevant to immunity, as well as to CACI's preemption and political question defenses, are established from Plaintiffs' own allegations, and this Court has jurisdiction to decide these issues now. CACI addressed appealability in responding to Plaintiffs' motion to dismiss CACI's appeal. To the extent Plaintiffs offer new arguments or authorities on appealability, CACI addresses them in Section II.E., *infra*.

Turning to the merits of CACI's appeal, Plaintiffs' response to virtually every argument is to beg the question by assuming "torture" and then arguing from that premise. "Torture," however, is a legal label that the Court need not accept, and should not accept here given that Plaintiffs do not allege any contact between themselves and CACI employees. Indeed, Plaintiffs have declined to defend the legal sufficiency of their allegations, Pl. Br. at 10, effectively abandoning the issue.

Plaintiffs' responses on immunity, preemption, and political question are no more availing. Plaintiffs misapply the relevant immunity precedents and claim that CACI's assertion of immunity is premature, but Plaintiffs' complaint supplies all of the factual allegations needed to establish CACI's immunity. With respect to preemption, Plaintiffs do not defend the district court's erroneous construction of the term "combatant activities." Plaintiffs also argue that the Defense Department, through rulemaking commentary, opposes preemption, but the United States recently repudiated Plaintiffs' argument. Plaintiffs argue that their claims do not present political questions, but have no answer for the exclusive constitutional

commitment of war matters to the political branches, or the lack of judicially discoverable standards for assigning a duty of care that accounts for the needs of a battlefield intelligence operation.

Therefore, the Court should reverse the district court's denial of CACI's motion to dismiss and remand with instructions to dismiss Plaintiffs' complaint with prejudice.

## II. ARGUMENT

### A. Plaintiffs Have Abandoned Any Argument That Their Amended Complaint Complies With The Pleading Requirements of *Twombly* and *Iqbal*

In its opening brief, CACI explained why Plaintiffs' Amended Complaint failed to meet the pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). CACI Br. at 29-35. Because Plaintiffs do not allege any contacts with CACI employees, their Amended Complaint is entirely dependent on establishing co-conspirator liability. *Id.* Plaintiffs' conspiracy allegation, however, is based solely on the allegation that "CACI conveyed its intent to join the conspiracy by making a series of verbal statements and by engaging in a series of criminal acts of torture alongside and in conjunction with several co-conspirators." JA.0022. This rote recitation of a legal conclusion does not suffice under *Twombly* and *Iqbal*. CACI Br. at 31-35.

Plaintiffs offer no argument as to the sufficiency of their allegations:

> CACI cites *Iqbal v. Ashcroft* and *Bell Atlantic Corp., et al. v. Twombly* and argues Detainees' claims lack plausibility, an argument the District Court rejected for the reasons set forth at JA.0464-71. Detainees are

> confident their Complaint complies with the pleadings standards, ***and do not brief that issue here.*** If the Court disagrees, Detainees stand ready to amend their Complaint with further details drawn from documentary and testamentary evidence provided by military and former CACI employees.

Pl. Br. at 10 (emphasis added) (citations omitted).

A party may not, however, state its "confidence" that it is right and leave it for the Court to figure out the arguments. An appellee must argue any issues it desires to have the Court decide in its favor. Fed. R. App. P. 28(a)(9) (requiring argument of the party's issues); Fed. R. App. P. 28(b) (Rule 28(a)(9) applies to appellees). Where a party elects not to assert any reasons for, or arguments supporting, its conclusions on an issue, this Court will deem the issue abandoned. *See, e.g.*, *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 993 n.7 (4th Cir. 1995) ("[A] party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue." (citation omitted)), *abrogated on other grounds by City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 744 (2004).

Thus, Plaintiffs have abandoned any contention that their Amended Complaint satisfies applicable pleading standards and, in any event, have provided the Court no basis for resolving this issue in Plaintiffs' favor. That said, the Court should not accept Plaintiffs' implied invitation to decide the case solely on *Twombly*/*Iqbal* grounds and remand for amendment, as amendment is futile given CACI's other defenses. *See McLean v. United States*, 566 F.3d 391, 400 (4th Cir. 2009).

## B. CACI Is Immune From Suit

### 1. CACI is Entitled to Derivative Absolute Official Immunity

Under *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1446-47 (4th Cir. 1996), a contractor is entitled to derivative absolute official immunity for suits arising out of its performance of governmental functions for which the United States is immune, provided the public benefits of immunizing the function being performed outweigh the costs of immunity. *Id.* at 1446-48.[1] Plaintiffs misapply *Mangold* and understate the public benefits associated with immunity.

#### a. CACI Was Performing a Delegated Governmental Function For Which The United States Is Immune

The first requirement for immunity under *Mangold* is that CACI personnel were performing a delegated governmental function for which the United States itself would be immune. *Mangold*, 77 F.3d at 1447-48 ("If absolute immunity protects a particular governmental function . . . it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions."); *see also Murray v. Northrop Grumman Information Tech., Inc.*, 444 F.3d 169, 174 (2d Cir. 2006). With respect to the nature of the function performed by CACI employees at Abu Ghraib prison, Plaintiffs claim that "discovery is needed" of CACI's relevant government contracts. Pl. Br. at 14. This argument is disingenuous and incorrect.

[1] Plaintiffs assert that "CACI actually misstates the holding of *Mangold*, which concerns contractors' eligibility to invoke *federal official* immunity, not sovereign immunity itself." Pl. Br. at 26 n.7. But CACI has always characterized *Mangold* as being grounded in derivative absolute official immunity. *See, e.g.*, CACI Br. at 16.

Plaintiffs do not need discovery to learn the contents of CACI's government contracts. They already have them. CACI's contracts were produced to these Plaintiffs' counsel in *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), and are a matter of public record, filed in *Saleh*'s publicly-available appendix. *See* Public Joint Appx., *Saleh v. CACI Int'l Inc*, No. 08-7001, at JA.0319-88 (D.C. Cir.).

Moreover, CACI's contracts are not necessary to determine whether CACI interrogators were performing a delegated governmental function at Abu Ghraib prison. The interrogation function at Abu Ghraib prison was under Army control, as the district court acknowledged. JA.0407-08 ("After the invasion the United States military took over Abu Ghraib prison and other facilities. . . . A U.S. Army military police brigade and a military intelligence brigade were assigned to the prison. The intelligence operation at the prison suffered from a severe shortage of military personnel, prompting the U.S. government to contract with private corporations to provide civilian interrogators and interpreters.").

The Army intelligence officer in charge at Abu Ghraib prison established the applicable interrogation policies. JA.0118 (interrogation rules of engagement), 0364-65 (detailing Army development of interrogation policies at Abu Ghraib prison). Plaintiffs' complaint explicitly alleges that "Defendants' acts took place during a period of armed conflict, in connection with hostilities." JA.0032. Plaintiffs ask this Court to suspend reality, and ignore the existing record, by treating it as unclear whether CACI personnel were at Abu Ghraib prison to perform services for the military or were in Iraq on a purely private lark.

Remanding so Plaintiffs' counsel can receive in discovery contracts that they already have adds nothing to the equation.

### b. Plaintiffs Ignore *Mangold*'s Framework In Order to Understate the Public Benefits of Immunity

Plaintiffs focus on the wrong considerations in determining the public interest in immunity. As this Court explained in *Mangold*, the focus is the public interest in immunity for the *government function* being performed, not whether there is an interest in immunity for the wrongdoing alleged. *Mangold*, 77 F.3d at 1447 ("[T]he scope of that immunity is defined by the nature of the *function* being performed . . . ."). This Court found immunity in *Mangold* based on the government's interest in the function being performed—"identifying fraud, waste, and mismanagement in government," *id.* at 1449—rather than considering whether the government had an interest in immunity for the misconduct alleged—providing *false* statements to government investigators. *Id.*[2] The Supreme Court has recognized the compelling public interest in war-zone detention activities, of which the interrogation mission is one component. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (arrest and detention activities "by 'universal agreement and practice,' are 'important incident[s] of war.'" (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942))). This crucial mission is most effectively

[2] Similarly, Plaintiffs suggest that *Mangold* immunity requires that the contractor "complied with the terms of [its] government contracts." Pl. Br. at 26. But *Mangold* involved an allegation that the contractors provided *false* statements to government investigators, 77 F.3d at 1448, conduct that, if true, would not be conduct complying with contractual obligations and also would be illegal, *see* 18 U.S.C. 1001.

accomplished without the looming specter of tort duties. CACI Br. at 21-24; *see* note 9, *infra*.

Plaintiffs argue that *United States v. Passaro*, 577 F.3d 207, 218 (4th Cir. 2009), precludes immunity. Pl. Br. at 20. But Plaintiffs ignore the fundamental difference between criminal prosecutions initiated by the sovereign, and private rights of action where the sovereign lacks control and prosecutorial discretion is non-existent. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion."). Most egregiously, Plaintiffs omit that *Passaro* expressly distinguished between criminal prosecutions and private civil suits:

> Passaro can cite *no* case holding, or even suggesting, that the exercise of prosecutorial discretion *by the Executive* somehow intrudes on the functions *of the Executive*. Instead, the cases on which Passaro relies involve *private citizens* suing the government in tort or in some other civil action.

*Passaro*, 577 F.3d at 216-17.

This distinction between criminal prosecution and private causes of action is evident in the immunity jurisprudence of the Supreme Court and this Court. In *Dow v. Johnson*, 100 U.S. 158, 166 (1879), the Court found the defendant immune from civil suit for acts of warfare, but acknowledged that he remained subject to

criminal prosecution.[3] In *Mangold*, this court held the defendants immune from civil suit, but never suggested they would be immune from prosecution if they had, in fact, lied to government investigators. *Mangold*, 77 F.3d at 1447-48. This distinction between criminal and civil law explains why private damages actions have not been permitted for conduct relating to the prosecution of war[4] while the federal power to prosecute crimes committed in war is relatively uncontroversial.[5]

### c. Congress and the Executive Have Not Rejected the Elimination of Tort Concepts From the Battlefield

Plaintiffs incorrectly assert that "Congress and the Executive have repeatedly rejected corporate efforts to carve out a tort-free zone for government contractors assisting the military in contingency operations." Pl. Br. at 26.

For their assertion that Congress has rejected efforts to remove tort law from the battlefield, Plaintiffs rely on the fact that contractors, because they are not the sovereign, are not entitled to the sovereign immunity retained under the Federal

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[3] *Dow*, 100 U.S. at 166 ("If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal, except that of public opinion, which, it is to be hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression.").

[4] *See* CACI Br. at 25-29. Plaintiffs cite a few cases to argue that American courts have welcomed private war-related tort suits. Plaintiffs mischaracterize the cases on which they rely, and CACI addresses Plaintiffs' cases at page 12-13, *infra*.

[5] *See, e.g.*, *United States v. Smith*, 63 M.J. 316 (C.A.A.F. 2010); *United States v. Calley*, 48 C.M.R. 19, 21 (C.M.A. 1973); *United States v. Griffen*, 39 C.M.R. 586 (A.C.M.R. 1968).

Tort Claims Act ("FTCA"), 28 U.S.C. § 2680. Pl. Br. at 27. This argument, however, has already been resolved by *Mangold*, where this Court held that the contractors were entitled to absolute official immunity even though they were not the sovereign. *Mangold*, 77 F.3d at 1447.[6] Moreover, Congress has not disturbed the Ninth Circuit's eighteen-year-old holding in *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992), that tort claims against a contractor for combat-related injuries were preempted because allowing such claims "would create a duty of care where the combatant activities exception is intended to ensure that none exists." *Id.* Thus, if anything, Congress has left in force judicial decisions holding that tort law should not apply to contractors involved in combatant activities. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009) (congressional inaction in the face of judicial decisions indicative that Congress did not intend a different result).

The basis for Plaintiffs' argument concerning Executive policy is their claim that the Defense Department, through cryptic rulemaking commentary, supposedly "went on record *against* insulating corporate contractors from tort liability." Pl. Br. at 28-29. This argument is wrong, was rejected in *Saleh*, and has been directly repudiated by the Executive itself.

In *Saleh*, the D.C. Circuit noted that the Defense Department's rulemaking comments applied to one type of government contract—a "performance-based

[6] Plaintiffs also assert that Congress has rejected immunity for contractors by not including contractors within the Westfall Act, 28 U.S.C. § 2679. Pl. Br. at 27. Again, this is a quarrel with *Mangold* itself, which held that the pre-Westfall Act common law of absolute official immunity continued to apply to contractors after the Westfall Act's enactment. *Mangold*, 77 F.3d at 1446-47.

statement of work," where the Government simply "describe[s] the work in terms of the required results rather than either 'how' the work is to be accomplished or the number of hours to be provided." *Saleh v. Titan Corp.*, 580 F.3d 1, 9-10 (D.C. Cir. 2009) (quoting 48 C.F.R. § 37.602(b)(1)). As the *Saleh* court noted, these types of government contracts have no applicability to CACI's provision of contract interrogators in Iraq, and the record well supports the military's extensive involvement in determining "how" interrogation operations would proceed. *Id.*; *see also* JA.0118, 0364-65.

Moreover, the United States recently repudiated the argument Plaintiffs make here. In recommending the denial of certiorari in a case where a combat-related tort suit against a contractor was dismissed on political question grounds, the United States rejected any argument that the Defense Department rulemaking comments reflected United States policy or its understanding of the state of the law. As the Acting Solicitor General explained:

> DoD, however, made clear that "it makes no changes to existing rules regarding liability," and that "[c]ontractors will still be able to defend themselves when injuries to third parties are caused by the actions or decisions of the Government." *To the extent there is ambiguity, this response was not intended to opine on the state of the law.*

Brief for United States as Amicus Curiae at 12 n.4, *Carmichael v. Kellogg, Brown & Root Serv., Inc.*, No. 09-683 (U.S., filed May 28, 2010) (emphasis added).

Indeed, the United States' brief also expressed considerable unease with the application of tort concepts to contractors providing services in support of the military in combat zones:

> Whatever the defense asserted, the decisions addressing them—and the various statutes and doctrines in this area more generally—reflect an understandable discomfort with readily subjecting the actions of government contractors who provide services to the U.S. military in war zones to private civil suits under state tort law. The decisions also evince genuine concerns about second-guessing military judgments, burdening the military and its personnel with onerous and intrusive discovery requests, and otherwise interfering with and detracting from the war effort. As a general matter, these concerns are well-founded.

*Id.* at 13. Thus, the Executive not only rejected Plaintiffs' reliance on rulemaking commentary, but has expressed considerable concern about the negative effect that battlefield tort claims against contractors would have on operational readiness.

### 2. CACI Is Immune From Plaintiffs' Suit Under the Law of Military Occupation

In its opening brief, CACI recited the case law holding defendants immune under the law of military occupation for damages claims arising out of the prosecution of a public war, as well as the district court's failure to even address this argument. CACI Br. at 25-29. Plaintiffs do not attempt to justify the district court's failure to address this immunity argument, and largely ignore the case law cited by CACI. Instead, Plaintiffs try to avoid this immunity by arguing that Virginia law can apply to Plaintiffs' claims. Plaintiffs' argument is beside the point, because immunity under the law of military occupation applies with equal

force to any civil claims brought under state or foreign law (CACI Br. 27-28). Moreover, Plaintiffs' argument that courts have applied Virginia law in such circumstances is based on a gross misrepresentation of the single district court case on which they rely.

Plaintiffs represent *Plowman v. United States Dep't of Army*, 698 F. Supp. 627 (E.D. Va. 1988), as "applying Virginia law to a tort suit for injuries that occurred in South Korea" aboard a U.S. military base. Pl. Br. at 38. But in *Plowman*, Judge Ellis actually held that the defendant was entitled to absolute official immunity from suit, *id.* at 638-39. Judge Ellis went on to observe that even if there were no immunity defense, the conduct alleged would not be tortious under Virginia law. *Id.* at 639 n.32. To that observation, Judge Ellis added an important qualifier that Plaintiffs elide: "*This assumes that Virginia law governs, a conclusion that is far from clear*." *Id.*

Plaintiffs also argue that an immunity determination should await choice-of-law decision, which Plaintiffs conclude will be forthcoming "at the appropriate juncture." Pl. Br. at 40. That juncture, however, is at the motion to dismiss stage. Neither Plaintiffs nor the district court identified any facts not evident from Plaintiffs' complaint that are necessary to decide choice of law. Even more to the point, as CACI has explained, a choice-of-law determination is not even necessary because CACI is immune under the law of military occupation from the tort law of any jurisdiction the laws of which conceivably could apply. CACI Br. at 27-29.

Finally, Plaintiffs have mischaracterized a small handful of cases to argue that private tort suits historically have been available for wartime injuries. Pl. Br.

at 27-28. In *The Paquete Habana*, 175 U.S. 677, 678-79 (1900), and *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 171-72 (1804), it was the United States that sought judicial review by filing libels seeking forfeiture of vessels. In both cases such review was prescribed by statute. *The Paquete Habana*, 189 U.S. 453, 464-65 (1903); *Little*, 6 U.S. (2 Cranch) at 177. Here, no federal statute gives foreign war detainees a private damages claim, and Plaintiffs' claims lack the involvement of the sovereign that existed in these cases.

In *Mitchell v. Harmony*, 54 U.S. 115, 128-29 (1851), the Executive had specifically authorized an American trader to operate during the Mexican War, and the defendant had seized his property despite that explicit authorization. In *Dow*, the Supreme Court noted the limitations of *Mitchell*, endorsing the result in *Mitchell* because the plaintiff had been a loyal American trader specifically authorized to conduct business, where the plaintiff in *Dow*, like the Plaintiffs here, was an inhabitant of invaded enemy territory. *Dow*, 100 U.S. at 170.

In *Ford v. Surget*, 97 U.S. 594, 605 (1878), the Court rejected tort liability, holding a civilian immune for claims arising out of his performance of an "act of war upon the part of the military." Plaintiffs' reliance on *Ford* is peculiar given their allegation that their claims arise out of "acts [that] took place during a period of armed conflict, in connection with hostilities," JA.0032, an allegation that falls directly within the scope of the immunity applied in *Ford*. Moreover, CACI notes that none of Plaintiffs' cases involved application of state law.

### C. Plaintiffs' Common-Law Tort Claims Are Preempted

#### 1. Plaintiffs' Attempt to Avoid Constitutional Preemption Is Based on a Mischaracterization of Precedent

CACI argued in its opening brief that Plaintiffs' war-zone tort claims were preempted by the Constitution's exclusive allocation of war powers to the federal government,[7] leaving no room for states to regulate the conduct of war through common-law tort actions. CACI Br. at 35-38. Plaintiffs offer three responses, but all are based on a misstatement of applicable precedent.

*First*, Plaintiffs argue that even if the Constitution exclusively allocates war powers to the federal government, that exclusive allocation preempts only state laws that are specifically targeted at the area of exclusive federal power. Pl. Br. at 51-52. The D.C. Circuit properly rejected this argument in *Saleh* because "it is a black-letter principle of preemption law that generally applicable state laws may conflict with and frustrate the purposes of a federal scheme just as much as a

[7] *See* U.S. Const. art. I, § 8, cls. 1, 11-16 (granting Congress the powers to provide for the common Defence; declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; raise Armies and a Navy; make Rules governing the land and naval Forces; provide for calling forth the Militia; provide for organizing, arming, and disciplining the Militia, and for governing them when called into national service; and make all Laws necessary and proper to those ends); *id.* § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation [or] grant Letters of Marque and Reprisal . . . ."); *id.* § 10, cl. 3 ("No State shall, without the consent of Congress . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent danger as will not admit of delay."); U.S. Const. art. II, § 2, cl. 1 (designating President as Commander in Chief); *see also Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950); *The Federalist* Nos. 24, 69 (Hamilton);

targeted state law." *Saleh*, 580 F.3d at 12 n.8 (citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005), and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992)). Indeed, it would be absurd to hold that the Constitution leaves the conduct of war to the federal government, but that states nonetheless may regulate war so long as they do it through laws that also regulate other matters.[8]

*Second*, Plaintiffs purport to quote *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984), for the proposition that "where the Court finds federal preemption, it 'does not normally preempt state law and simply leave the field vacant. Instead, it substitutes a federal common law regime.'" Pl. Br. at 54. The quoted material, however is not from *Silkwood*; it is from the *dissent* in *Saleh*. *See Saleh*, 580 F.3d at 31 (Garland, J., dissenting). Moreover, it is widely acknowledged that Congress enacted the combatant activities exception to the FTCA in order to *eliminate* tort duties of care on the battlefield;[9] under such circumstances, the federal tort duty of

[8] Plaintiffs also cite *Mitchell*, 54 U.S. at 115, *Ford*, 97 U.S. at 594, and *The Paquete Habana*, 175 U.S. at 677, for the proposition that "this Court must follow controlling Supreme Court precedents that have permitted claims arising during war to proceed under common law torts." Pl. Br. at 51. CACI has explained why these cases do not support Plaintiffs' arguments at page 12-13, *supra*.

[9] *See Saleh*, 580 F.3d at 7 ("In short, the policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield . . . ."); *Koohi*, 976 F.2d at 1376 ("[O]ne purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action."); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 18 (D.D.C. 2005) ("The exception seems to represent Congressional acknowledgement that war is an inherently ugly business for which tort claims are simply inappropriate.").

care is that there *is no tort duty of care*, and this elimination of a duty of care thus supplants any state-law duties of care. *Saleh*, 580 F.3d at 7 ("[T]he federal government occupies the field when it comes to warfare, and its interest in combat is always 'precisely contrary' to the imposition of a non-federal tort duty."). Moreover, the United States, though not required to do so, *has* implemented an alternative to state tort law to compensate any person with a legitimate claim of detainee abuse. *See Saleh*, 580 F.3d at 2 ("The U.S. Army Claims Service has confirmed that it will compensate detainees who establish legitimate claims for relief under the Foreign Claims Act.").

*Third*, Plaintiffs make a confusing argument that they may proceed with their tort claims even if they cannot "invoke state law duties of care," apparently arguing that state law may allow a damages remedy for violation of a federal standard of care. Pl. Br. at 53.[10] Given, however, that the *federal* standard is that there is no tort duty of care for combatant activities (*see* note 9, *supra*), there is no such federal duty that could support an award of damages under state law.

[10] The cases cited by Plaintiffs at page 53 of their brief do not support their proposition. The quote they ascribe to *Silkwood* does not appear in that case, but in *Abdullah v. American Airlines*, 181 F.3d 363, 375 (3d Cir. 1999). *Silkwood* merely stands for the proposition that where Congress repeatedly stated its intent that federal nuclear safety regulation not preempt state-law tort claims, the federal legislation also did not preempt punitive damages for such state-law tort claims. *Silkwood*, 464 U.S. at 257. *Medtronic v. Lohr*, 518 U.S. 496, 495 (1996), *Cipollone*, 505 U.S. at 519, and *Abdullah*, 181 F.3d at 375, merely note that states, where appropriate, may provide a damages remedy for violations of federal standards of care. Plaintiffs, however, have not identified a federal standard of care for war-zone tort claims, and courts have repeatedly noted that Congress has determined that such tort duties should not exist. *See* note 9, *supra*.

### 2. CACI Is Entitled to Combatant Activities Preemption

Plaintiffs do not defend the district court's construction of combatant activities as essentially limited to the act of firing a weapon at an enemy. Plaintiffs' concession is well advised, as the district court's construction of that term is contrary to that of both courts of appeals considering the question. *See Saleh*, 580 F.3d at 6 (noting that "combatant activities" includes "the detention of enemy combatants"); *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948) (combatant activities "include not only physical violence, but activities necessary to and in direct connection with actual hostilities."). More recently, another judge from the Eastern District of Virginia rejected the district court's narrow definition of "combatant activities" as contrary to *Saleh* and inconsistent with the text of the combatant activities exception. *Taylor v. Kellogg, Brown & Root Servs., Inc.*, No. 2:09-cv-341, 2010 WL 1707530, at *10 (E.D. Va. Apr. 16, 2010), *appeal docketed*, No. 10-1543 (4th Cir. May 14, 2010) .

Rather than defend the district court's erroneous test for combatant activities, Plaintiffs instead argue that "this Court lacks any record evidence on which to find that CACI was engaged in combatant activities." Pl. Br. at 58. But Plaintiffs' own complaint expressly makes such an allegation: "Defendants' acts took place during a period of armed conflict, in connection with hostilities." JA.0032. This allegation brings Plaintiffs' claims squarely within the recognized scope of combatant activities—"activities necessary to and in direct connection with hostilities." *Johnson*, 170 F.2d at 770. The district court further noted that Abu Ghraib prison was under Army control, and that CACI interrogators were

brought to the site to augment the military intelligence brigade. JA.0407-08. Indeed, these Plaintiffs' counsel conceded in *Saleh* that the CACI employees at Abu Ghraib prison were performing combatant activities. *Saleh*, 580 F.3d at 6.[11]

Plaintiffs other three arguments against combatant activities preemption are equally unavailing. *First*, Plaintiffs argue that preemption is inappropriate because the exceptions to the FTCA do not expressly immunize contractors. But this argument is really just "quarrel[ing] with *Boyle* [*v. United Techs. Corp.*, 487 U.S. 500 (1988),] where it was similarly argued that the FTCA could not be a basis for preemption of a suit against contractors." *Saleh*, 580 F.3d at 6.

*Second*, Plaintiffs try to confuse the issue by urging a preemption test that is based on the congressional policies underlying the discretionary function exception rather than the combatant activities exception on which CACI relies. Pl. Br. at 55-

[11] At oral argument in *Saleh*, these Plaintiffs' counsel engaged in the following colloquy with the court:

> JUDGE SILBERMAN: You don't have any doubt that in this case the judge was right in concluding that there was war and there were combatant activities?
>
> MS. BURKE: There was definitely war, and there was definitely combatant activities. Now, there was not the activities themselves, the cause of action what arose here did not actually happen in combat.
>
> JUDGE SILBERMAN: It doesn't matter, it's still combat activity.
>
> MS. BURKE: It's still within the combatant activities.
>
> JUDGE SILBERMAN: Okay.
>
> MS. BURKE: Because that is a broader term than combat. But we would say, and this is really what we'll get to the CACI argument, but the duty of care is different in combat than it is in that broader zone of combatant activities.

Oral Arg. Tr., Feb. 9, 2009, *Saleh v. Titan Corp.*, No. 08-7001 (D.C. Cir.).

56. Given that congressional intent "is the ultimate touchstone" in every statutory preemption case, *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009), and that cases addressing combatant activities preemption have focused heavily on the intent underlying that exception,[12] it is surprising, and telling, that Plaintiffs pay no mind to the policies embodied in the combatant activities exception.

*Third*, Plaintiffs argue that the Defense Department "has urged the federal judiciary to hold corporate contractors providing services accountable for the negligence of their employees." Pl. Br. at 58. As CACI noted in Section II.B.1.c, *supra*, the United States has repudiated Plaintiffs' novel interpretation of the Defense Department's rulemaking commentary.

### D. Plaintiffs' Claims Present Nonjusticiable Political Questions

Plaintiffs argue that their claims are justiciable because tort suits are "constitutionally committed" to the judiciary. Pl. Br. at 41. Plaintiffs' argument is circular, as the political question doctrine is designed to determine the *scope* of the judiciary's power under the Constitution. If Plaintiffs' position were correct, tort suits never would be barred by the political question doctrine because such suits are committed to the judiciary. This, of course, is not true, as a number of courts, including this one, have found that the political question doctrine rendered tort suits nonjusticiable.[13]

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[12] *See Saleh*, 580 F.3d at 7-9; *Koohi*, 976 F.2d at 1336-37; *Taylor*, 2010 WL 1707530, at *10.

[13] *See, e.g.*, *Tiffany v. United States*, 931 F.2d 271, 277-78 (4th Cir. 1991) (tort suit against the United States); *Carmichael v. Kellogg, Brown & Root Svcs.*, 572 F.3d 1271, 1281-83 (11th Cir. 2009) (tort suit against contractor); *Corrie v.*

(Continued …)

Indeed, in *Tiffany*, this Court recognized that "[t]he strategy and tactics employed on the battlefield are clearly not subject to judicial review." 931 F.2d at 277-78. As Plaintiffs are seeking to achieve exactly that end—to obtain judicial review of the conduct of the battlefield detention and interrogation mission at Abu Ghraib prison—the political question doctrine renders Plaintiffs' claims nonjusticiable. Plaintiffs offer selective quotations from *Tiffany*, 931 F.2d at 280, to argue that the Court found a political question in that case only because the plaintiff had not alleged a violation of a statute or formal federal regulation. Pl. Br. at 45-46. But in *Tiffany*, the Court merely noted that the plaintiff had not alleged a violation of a statute or formal regulation *that created a duty of care to the plaintiff*. *Tiffany*, 931 F.2d at 280-81. Here, as the court noted in *Saleh*, every indication is that Congress did not desire that a tort duty of care would extend to those injured by wartime conduct. *Saleh*, 580 F.3d at 7; *see also Koohi*, 976 F.2d at 1376.

The D.C. Circuit recently made this very point. While recognizing that it is "the province and duty of the judicial department to say what the law is," the Court nevertheless affirmed dismissal of a claim arising out of the United States' bombing of a Sudanese factory because "[a] plaintiff may not, for instance, clear the political question bar simply by 'recasting [such] foreign policy and national security questions in tort terms.'" *El-Shifa Pharmaceutical Indus. Co. v. United*

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*Caterpillar, Inc.*, 503 F.3d 974, 982-83 (9th Cir. 2007) (tort suit against contractor); *Taylor*, 2010 WL 1707530, at *6-7 (tort suit against contractor).

*States*, ___ F.3d ___, 2010 WL 2352183, at *4, 6 (D.C. Cir. June 8, 2010) (en banc) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and *Schneider v. Kissinger*, 412 F.3d 190, 197 (D.C. Cir. 2005)). Because the tort suit in *El-Shifa* necessarily concerned whether the war-zone conduct at issue "should have occurred," *id.* at *5 (quoting *Harbury v. Hayden*, 522 F.3d 413, 420 (D.C. Cir. 2008)), the plaintiff's claims presented a nonjusticiable political question. Similarly, a determination of how the military intelligence operation at Abu Ghraib prison, which CACI personnel augmented, *should have* treated detainees may be a proper issue for criminal prosecution, *see Passaro*, 577 F.3d at 216-17, but it is not an issue properly resolved in the context of a private tort suit.

Plaintiffs also give short shrift to the lack of judicially discoverable standards for deciding tort claims brought by persons detained as enemies in a war zone. Apart from the difficulty of discovering evidence from a theater of war, tort law involves trade-offs among competing policies in determining reasonable standards of care. *See Binakonsky v. Ford Motor Co.*, 133 F.3d 281, 285 (4th Cir. 1998). Neither a judge nor a jury is well-suited to determine the appropriate standard of care in light of the needs of the battlefield intelligence operation in Iraq. As the Supreme Court recently observed, federal judges, as distinguished from the political branches, do not begin their days with national security briefings. Thus, "when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked.'" *Holder v. Humanitarian Law Project*, No. 08-1498, 2010 WL 2471055, at *22 (U.S. June 21, 2010) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981)). Notably, the

Executive, with its superior ability to discover facts from the Iraqi theater of war and to balance duties of care with wartime exigencies, *has* established an administrative process for paying legitimate claims of detainee abuse. *See Saleh*, 580 F.3d at 2-3. There is no reason for the judiciary to provide a compensation scheme to compete with the arrangement made available by the political branches to which war matters are constitutionally committed.

Finally, Plaintiffs argue that allowing wartime tort claims to proceed in court "do[es] not contradict pronouncements by the Executive and Legislative branches." Pl. Br. at 49. Plaintiffs' analysis, however, focuses on federal legislation regarding torture, which is a legal label Plaintiffs have placed on their claims but for which they allege no facts. *See* Pl. Br. at 10.

Equally important, the anti-torture statutes upon which Plaintiffs rely share one common characteristic—although several permit criminal prosecution, or civil litigation for conduct under color of *foreign* law, none provides for a private right of action in the circumstances at issue here. *See Saleh*, 580 F.3d at 16. Where Congress has created certain remedies, courts should be wary of creating others through implication from the common law. *See Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

### E. CACI's Appeal Is Not Premature

While Plaintiffs' brief is replete with arguments that CACI's appeal is premature, the only argument not raised in the prior motion to dismiss pleadings is a contention that *Martin v. Halliburton*, 601 F.3d 381 (5th Cir. 2010), supports

dismissal of CACI's appeal. *Martin* is no help to Plaintiffs. Plaintiffs also make vague references to needing discovery of CACI's contract, omitting that their counsel already has a publicly-available copy (*see* page 5, *supra*). This Court has appellate jurisdiction, and the record contains all the facts the Court needs to hold CACI immune from suit.

It is black-letter law that the denial of absolute immunity is immediately appealable. *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); *Roberson v. Mullins*, 29 F.3d 132, 134 n.1 (4th Cir. 1994). CACI has asserted two bases for absolute immunity from suit: (1) derivative absolute official immunity, *see Mangold*, 77 F.3d at 1446-47; and (2) absolute immunity pursuant to the law of military occupation, *see Dow*, 100 U.S. at 165, a defense the district court impliedly rejected by failing to address it. In *Mangold* itself, this Court held that the government contractor in that case was entitled to an immediate appeal. *Mangold*, 77 F.3d at 1453. Moreover, as in *Mangold*, the immunity associated with the law of military occupation is an immunity from trial, and not merely a defense to liability, and is therefore an immediately appealable form of absolute immunity. *Dow*, 100 U.S. at 165 (referring to the defendant's immunity as an "exemption from . . . civil proceedings").[14]

[14] Because the Court has appellate jurisdiction over the district court's denial of immunity, it also has appellate jurisdiction to determine the legal sufficiency of Plaintiffs' complaint. *Iqbal*, 129 S. Ct. at 1946-47. The Court has jurisdiction to consider CACI's political question defense because that defense bears on the Court's subject-matter jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). The Court has pendent appellate jurisdiction to consider CACI's preemption defenses because the issues involved in that defense

(Continued …)

That the district court noted that CACI might renew its immunity motion on summary judgment, while also expressing doubt it would reach a different result (JA.0434), does not deprive this Court of appellate jurisdiction, as the denial of absolute immunity on a motion to dismiss is immediately appealable. *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997). Moreover, this Court has held that it has appellate jurisdiction to review a district court's conclusion that discovery was needed before deciding immunity. *McVey v. Stacy*, 157 F.3d 271, 275-76 (4th Cir. 1998).

Plaintiffs rely on *Martin*, 601 F.3d at 388, but that case has no bearing here. In *Martin*, the court dismissed the contractor's appeal because it did not find the contractor's derivative absolute official immunity defense "substantial" (defined by the court as "more than merely colorable"), and determined that the contractor's other defenses were defenses to liability but did not involve a right not to be tried. *Id.* at 389-91. This Court does not appear to place this additional "substantiality" requirement on its appellate jurisdiction,[15] but CACI would satisfy such a test even if it were applicable.

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substantially overlap with the issues involved in CACI's immunity defenses. *Rux v. Sudan*, 461 F.3d 461, 475 (4th Cir. 2006).

[15] *See Parrish v. Cleveland*, 372 F.3d 294, 301 (4th Cir. 2004) (collateral order jurisdiction exists over an order that "conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and would be effectively unreviewable on an appeal from a final judgment").

In *Martin*, the contractor had not asserted immunity based on the law of military occupation, a defense CACI has asserted here. That immunity is available for "any act done in the prosecution of a public war," *Freeland v. Williams*, 131 U.S. 405, 417 (1889), and is available to civilians, *Ford*, 97 U.S. at 606-07. Given that Plaintiffs have alleged that "Defendants' acts took place during a period of armed conflict, in connection with hostilities" (JA.0032), appellate jurisdiction would exist even under the more stringent Fifth Circuit test.

Moreover, as respects derivative absolute official immunity, the *Martin* court viewed it as an ironclad requirement that the defendant was performing a discretionary function. *Martin*, 601 F.3d at 388-89. *Mangold* is the law in this Circuit, and under *Mangold* the relevant question is whether the defendant was performing a "governmental function" for which the United States itself would be immune. *Mangold*, 77 F.3d at 1447-48. Plaintiffs' allegations demonstrate that CACI personnel were engaged in combatant activities (*see* JA.0032), which is a governmental function for which the United States is immune. *See* 28 U.S.C. § 2680(j). Thus, CACI's two immunity defenses are more than substantial and this Court has jurisdiction to hear CACI's appeal.

## III. CONCLUSION

For the foregoing reasons, the Court should reverse the district court's order denying CACI's motion to dismiss, and remand with instructions to dismiss Plaintiffs' action with prejudice.

Respectfully submitted,

*/s/ John F. O'Connor*

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July 1, 2010

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)**

I, John F. O'Connor, hereby certify that:

1. I am an attorney representing Appellants CACI International Inc and CACI Premier Technology, Inc.

2. This brief is in Times New Roman 14-pt. type. Using the word count feature of the software used to prepare the brief, I have determined that the text of the brief (excluding the Table of Contents, Table of Authorities, and Certificates of Compliance and Service) contains 6,968 words.

*/s/ John F. O'Connor*

John F. O'Connor

## CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2010, I caused a true copy of the foregoing to be filed through the Court's electronic case filing system, and served through the Court's electronic filing system on any of the below-listed counsel of record registered with the Court's electronic filing system. I also caused a copy of Appellants' Reply Brief to be served by first-class U.S. Mail, postage prepaid, on the same below-listed counsel:

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